Having considered the applications of the general rule, there is left the point as to the degree of connection between the illegality and the contract. It is evident that if the illegality is involved in a condition or engagement of a contract the parties are *in pari delicto*. *Faikney* v. *Reynolds* (1767) 4 Burr. 2069; *Armstrong* v. *Toler* (1826) 11 Wheat. 258; *Phalen* v. *Clark* (1849) 19 Conn. 421. It would seem that the same results should be reached where the illegality forms the inducement or object of entering into a contract otherwise valid. *Armstrong* v. *Toler*, supra; *Phalen* v. *Clark*, supra; cf. *Bateman* v. *Fargason* (1880) 4 Fed. 32. It would seem immaterial that there has been illegality between the parties in a prior, subsequent, or purely collateral agreement or transaction. *Tracy* v. *Talmage*, supra; *Hodgson* v. *Temple* (1813) 5 Taunt. 181; cf. *Laughton* v. *Hughes* (1813) 1 H. & S. 593. These principles seem to justify those decisions which hold that mere knowledge by a dealer that goods he sells are to be put to an illegal use does not bar him from recovering their price; *Tracy* v. *Talmage*, supra; *Hodgson* v. *Temple*, supra; but if he aids directly in the illegal act or sells them with the purpose that they shall be illegally used he will be barred. *Tracy* v. *Talmage*, supra; *Armstrong* v. *Toler*, supra.

Since the doctrine of *par delictum* is founded on public policy it is evident that if it is to the direct and material interest of the public that the plaintiff should recover not only are his technical rights immaterial but also his rights measured by the ordinary rules of *par delictum* between private individuals. *DeGroot* v. *Van Duzer* (1830) 20 Wend. 390; *St. John* v. *St. John* (1805) 11 Ves. 536; *O'Conner* v. *Ward* (1883) 16 Miss. 1025; *Ford* v. *Harrington*, 16 N. Y. 285. This is illustrated by a late case in Mississippi, *Noxubee Co.* v. *The City of Macon* (1907) 43 So. 304, where the plaintiff, a city alderman, sought to enjoin the performance of a contract between the city and another alderman as being prohibited by the state constitution. The court overruling the objection made by the defendant that the plaintiff himself had engaged in a similar transaction, granted the relief. The decision was proper either on the ground that the public interest was directly involved or that the alleged illegality of the plaintiff was collateral. Ultra vires contracts and contracts involving property interests have not been treated here as the rules of policy governing them stand upon a different basis and involve different considerations. See 7 COLUMBIA LAW REVIEW, 196.

QUASI-CONTRACTUAL RIGHTS OF A DEFAULTER UNDER AN EXPRESS CONTRACT.—Three distinct exceptions are now said to be recognized, see 2 Sedgwick, Damages §§ 654 to 663, to the strict rule laid down in early English cases that a quasi-contract will not be raised where an express contract exists between the parties as to the same subject matter. *Cutter* v. *Powell* (1795) 6 T. R. 320; *Hulle* v. *Heightman* (1802) 2 East 145; *Sinclair* v. *Bowles* (1829) 9 B. & C. 92. The first exception is said to arise where the defendant has knowingly accepted something tendered under the contract, but which in fact was different from that which was contracted for; *Dermott* v. *Jones* (1859) 23 How. 220; the second, where the defendant has committed a breach going to the essence, and the plaintiff has, therefore, elected not to continue performance; *Clark* v. *Mayor* (1850)

4 N. Y. 338, *Lincoln* v. *Schwartz* (1873) 70 Ill. 134; and the third, where the plaintiff himself has discontinued after part performance of an entire contract. *Britton* v. *Turner* (1834) 6 N. H. 481; *Pixler* v. *Nichols* (1859) 8 Ia. 106; *Wilson* v. *Wagar* (1873) 26 Mich. 452. It is submitted that the so-called first exception is not an exception at all, for where a person has expressly contracted for one thing and knowingly accepts another, he cannot be said to accept it under the express contract, but independently of it, and incurs the correspondingly independent duty, under a contract implied in fact, to pay for the thing received; see opinion of Parke, J. in *Reed* v. *Rann*, supra; Keener, Quasi-Cont. 219; 2 Smith's L. Cas. 42; to which the rule allowing general assumpsit for extra work, 2 Sedgwick on Damages § 655, is merely a corollary. The second exception is treated in 7 COLUMBIA LAW REVIEW 123, and will not be discussed here further than to say that, although to allow an action in quasi-contract under such circumstances tends to decrease rather than to increase the defendant's pecuniary damages, it seems to be a dangerous encroachment upon the integrity of contracts, to be contrary to the intention of the parties, and to be entirely unnecessary.

The cases where the plaintiff has discontinued after partial performance may be subdivided into two classes. In class A are those cases where the defendant is, at the time of the plaintiff's discontinuance, in a position to put the parties in statu quo, *Shipton* v. *Casson* (1826) 5 B. & C. 378; *Oxendale* v. *Wetherell* (1829) 9 B. & C. 386; *Bowker* v. *Hoyt* (1836) 18 Pick. 555, while in class B are those cases where this is not possible, either because the defendant has used the subject matter, or for other reasons. *Britton* v. *Turner*, supra; *Pixler* v. *Nichols*, supra; *McKinney* v. *Springer* (1851) 3 Ind. 59. In some respects the cases in class A seem like those grouped under the first exception in that the defendant under both sets of circumstances has an opportunity under the changed state of affairs to treat the goods as his own, or to return them, but the resemblance is really only superficial. Under the first exception the defendant knows when he takes the thing which the plaintiff tenders that the plaintiff is not performing the express contract, and therefore it is neither incorrect on principle nor unjust to find a contract implied in fact to pay for the thing tendered and accepted, but in class A the defendant accepts the thing tendered only because it is a part of a larger whole, and because he depends upon the terms of the express contract to procure that whole for him, and it is therefore objectionable upon principle to say to him "because the other party has not performed you must either return the thing received, or we shall ignore the express contract under which you accepted the thing as part of a larger whole, and shall arbitrarily imply that you made a contract to accept just this, and to pay the pecuniary value which it, under the circumstances, bears in your hands." Although such a decision is unsound it does at least give the defendant an alternative. But if, in class B, a similar contract is implied, the defendant has no alternative, because to make return is impossible, and he is forced to be made a party to a contract after its performance, and one into which he had no intention to enter. Nor should the plea of hardship to the plaintiff have any weight where the breach of his contract has been willful, since he must be presumed to have gone

into the contract knowing all of its conditions, and after considering all of the consequences of a breach, to have decided that less was to be lost by breaking than by completing the contract. To make such a choice easy, whenever performance would for any reason be unpleasant or irksome, puts a premium upon breaches of contract. In England and Massachusetts this exception has only been occasionally allowed in class A and not at all in class B, and the general practice is severely criticised in these jurisdictions and in others where it is entirely rejected. *Munro* v. *Butt* (1858) 8 E. & B. 738; *Stark* v. *Parker* (1824) 2 Pick. 267; *Lantry* v. *Parks* (1827) 8 Cow. 63; *Hapgood* v. *Shaw* (1870) 105 Mass. 276. When the breach is involuntary, and the causes are beyond the plaintiff's control one's sympathy is certainly aroused, and some jurisdictions allow a quasi-contractual action under these circumstances, which do not allow it when the breach is willful; *Lakeman* v. *Pollard* (1857) 43 Me. 463; *Wolfe* v. *Howes* (1859) 20 N. Y. 197; *Green* v. *Gilbert* (1867) 21 Wis. 395. If, however, the condition is express or implied in fact, the principle is the same, whether the breach is willful or involuntary, since in both the possibilities of the contract were known from the start by both parties. Sympathy can hardly be urged as a ground for implying the right at law to give redress in disregard of the rights of the other party under the contract. It would seem logically inevitable that cases of substantial performance, *Taylor* v. *Williams* (1858) 6 Wis. 361; *Pinches* v. *Swedish Church* (1887) 55 Conn. 183, unless the performance with variations has been knowingly accepted so as to bring the case within the so-called first exception, should also be classed with the cases of the third exception. But in the most important of such cases, namely, those arising out of building contracts, specific performance with compensation may be obtained in equity.

In a recent case in Indiana, *Cleveland Ry. Co.* v. *Scott* (1906) 79 N. E. 226, the plaintiff contracted with the defendant to do a certain entire piece of work at a certain rate, 90 per cent. of the payment for work done to be made monthly, and the remaining 10 per cent. to be paid upon completion of all of the work. The contract was, therefore, entire. 2 Parsons, Contracts, 675 n. 1; *Lumber Co.* v. *Purdum* (1884) 41 Ohio St. 373. The plaintiff stopped work in November because of frost, and the defendant did not pay for the November work on the 20th of the ensuing month, as had been customary. Time is not generally of the essence of a contract except for the sale of goods unless it appears that such was the intention of the parties, *Henderson* v. *M'Fadden* (1901) 112 Fed. 389, and as there was no such intention shown in this contract, the failure to pay on Dec. 20th would not seem to have been such a breach as to give the plaintiff the right to elect not to perform further. 7 COLUMBIA LAW REVIEW 123. But even if such a right had existed at the time, the plaintiff probably lost it by not immediately bringing suit or notifying the defendants, and allowing them, until the following April, to act under the contract as still in full operation. See *Roper* v. *Johnson* (1873) L. R. 8 C. P. 167, 180. If this is true the plaintiff's refusal on April 1st to continue was an inexcusable breach on his part. The court based its decision mainly upon this ground and held that notwithstanding this willful breach, the plaintiff could recover in quasi-contract, although intimating that his refusal to perform further and his action in quasi-contract may have

been justified by the defendant's default in payment. Under the previous analysis of the subject, the decision was incorrect upon either hypothesis.

EFFECT OF TRANSFER OF SHARES UPON STATUTORY LIABILITY OF STOCKHOLDER.—During the first half of the last century, a provision for the personal liability of the stockholders upon corporate debts was generally inserted in corporation statutes and charters; of late years this has been chiefly confined to corporations whose capital is not fully paid up, debts due for labor, and the indebtedness of banking institutions. Although this liability is purely statutory, the statutes have usually been silent as to the passing of the liability with a transfer of the shares, thus leaving this question to the courts.

From the start a conflict of opinion developed. *Middletown Bank* v. *Magill* (1823) 5 Conn. 28. The earliest statutes made the liability of each stockholder co-extensive with that of the corporation *Southmayd* v. *Russ* (1819) 3 Conn. 52; *Allen* v. *Sewall* (1829) 2 Wend. 327. It was generally held that the obligation rested upon a true contract; *Corning* v. *McCullough* (1847) 1 N. Y. 47; that the stockholders were liable as principal debtors; *Hargis* v. *McCullough* (1846) 2 Den. 119; *Mokelumne Co.* v. *Woodbury* (1859) 14 Cal. 265; or as sureties, *Hanson* v. *Donkersley* (1877) 37 Mich. 184, substantially as partners, *Deming* v. *Bull* (1835) 10 Conn. 409; that their personal credit was relied on by the creditors, *Moss* v. *Oakley* (N. Y. 1842) 2 Hill 265; *Chesley* v. *Pierce* (1855) 32 N. H. 388; and that the remedy might be by action at law. *Bank* v. *Ibbotson* (1840) 24 Wend. 473. It was accordingly held in a line of New York cases that a shareholder still remained liable on debts of the corporation contracted while he held his stock, even though he transferred it in good faith. *Moss* v. *Oakley*, supra; *Judson* v. *Rossie Galena Co.* (N. Y. 1842) 9 Paige 598. These decisions had their influence on later cases in this country, even when the statutes and conditions had changed. *Tracy* v. *Yates* (1854) 18 Barb. 152; *Williams* v. *Hanna* (1872) 40 Ind. 535; *Hager* v. *Cleveland* (1872) 36 Md. 476.

Two theories of the nature of the stockholder's statutory liability have been recognized: the one based on contract, the other on quasi-contract. 5 COLUMBIA LAW REVIEW 606. Upon the contract theory, the question of whether the liability devolves upon a transfer of the stock, depends upon whether such transfer can constitute an implied novation. Where, as in the early cases, corporations were small and each stockholder liable for the whole amount of the debts, the personal credit of its stockholders was an important factor, relied upon by the creditor. Moreover, the number of stockholders was limited and transfers less frequent. Under such circumstances it was difficult to work out a real novation and so relieve the transferor from liability. *Moss* v. *Oakley*, supra. But this argument loses its force under the modern conditions of numerous stockholders, limited liability and frequent transfers. The creditor does not look to the personal credit of the individual stockholders, but only to the general credit of the corporation. It seems, therefore, as if to-day a novation in fact may properly be grounded upon the creditor's agreement